Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

To: The Commission

CONSOLIDATED REPLY
OF THE CATHOLIC TELEVISION NETWORK
AND THE NATIONAL ITFS ASSOCIATION

The Catholic Television Network ("CTN") and the National ITFS Association ("NIA"), by their attorneys, hereby submit this Consolidated Reply to Oppositions to the Petition for Reconsideration ("Petition") filed by CTN and NIA on January 10, 2005 in the above captioned matter.[1]

[1] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order ("*Report and Order*") and Further Notice of Proposed Rulemaking

I. Geographic Licensing, Pre-Transition Two-Way Operations, D/U Ratios and Interference Issues

In their Petition, CTN and NIA raised important issues regarding interference that could result to EBS receive sites from (i) two-way service prior to transition, which will result in an incompatible mix of high power video services and low power cellularized services on interleaved channels in the same band; and (ii) the elimination of D/U ratio protection, both before transition throughout the band, and after transition in the Mid-Band Segment. CTN and NIA suggested a process by which, at the very least, any operator deploying two-way facilities pre-transition would be required to resolve promptly any actual instances of interference. CTN and NIA also suggested a process by which D/U ratio protection would continue in a manner that does not require prior Commission applications.

Several parties, including the WCA, Nextel and Clearwire, took issue with these concerns.[2] While these parties suggest that the potential for interference is exaggerated, they offer no credible engineering support for the notion that intermixing two-way low power and one-way high power operations will not result in interference, or that interference can be avoided to EBS receive sites in the absence of D/U ratio protection. Their focus instead is on avoiding any absolute prohibition on two-way deployments prior to transition.

("*FNPRM*"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004). A summary of the *Report and Order* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,020.

[2] Consolidated Opposition to Petitions for Reconsideration of the Wireless Communications Association International, Inc. ("WCA"), filed February 22, 2005 at 12; Consolidated Opposition to Petitions for Reconsideration of Nextel Communications ("Nextel"), filed February 22, 2005 at 26; and Opposition to Petitions for Reconsideration of Clearwire Corporation ("Clearwire"), filed February 22, 2005 at 13.

The WCA described the alternative proposal advanced by CTN and NIA that would allow some pre-transition deployments under the geographic licensing scheme as a "useful framework."[3] The WCA also said that it is not "necessarily opposed" to the use of D/U ratios for post-transition interference protection in the MBS, and, subject to the same concerns about refining NIA's and CTN's alternative proposal, "applauded" NIA and CTN for advancing an approach designed to afford D/U protection under a geographic licensing regime.[4] CTN and NIA are working with WCA and others in an effort agree upon a workable interference avoidance framework for both pre-transition two-way operations and post-transition MBS operations that will effectively avoid or ameliorate interference without unduly inhibiting the provision of new services. The parties intend to report back to the Commission on the outcome of these discussions as soon as possible.

II. Transition Safe Harbors

CTN and NIA suggested that the Commission adopt two additional safe harbors to assist EBS licensees and proponents alike in addressing transition situations where an EBS licensee is entitled to more than one video program track (Safe Harbor 3), and where there is more than one EBS licensee on a particular channel group (Safe Harbor 4). With respect to Safe Harbor 3, IMWED objected, urging that EBS licensees with more than one video programming service be accommodated in the Mid-Band Segment without having to have multiple MBS channels.[5] With respect to Safe Harbor 4, IMWED

[3] WCA Opposition at 15.

[4] Id. at 16.

[5] Consolidated Opposition to Petitions for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED"), filed February 22, 2005 at 4.

objected to the notion of splitting the MBS channel in any particular shared EBS channel group as a way of accommodating multiple licensees needing video capacity on a particular MBS channel.

CTN and NIA continue to believe that the two additional safe harbors, as envisioned by the original Coalition Proposal, make sense and should be adopted. In rejecting Safe Harbor 3, IMWED would apparently require proponents to pay the cost of digitizing MBS channels to accommodate multiple video program tracks even when there are other available MBS channels that could be offered, on an analog basis, to accommodate those programming needs. From a public policy perspective, it does not make sense to require a proponent to undertake the expense of digitizing MBS channels where sufficient analog capacity is available on other channels in the MBS. As for Safe Harbor 4, IMWED's plan (always to give the whole MBS channel in a group to whichever EBS licensee happens to be holding the fourth channel in the group now) could deprive some EBS licensees (*i.e.,* those holding other than the fourth channel in a group) from having any continuing video transmission capability. IMWED's plan is arbitrary and inherently unfair to certain licensees, and should be rejected.

III. Transition Process and Related Penalties

In its opposition, HITN expresses concern over suggestions by the WCA and Nextel that penalties be imposed on EBS licensees who fail to respond fully to pre-transition data requests or submit a counterproposal to what ultimately is determined to be a reasonable transition proposal.[6] With respect to the timing of responses to pre-transition data requests, the 21 days suggested by the WCA is the same period originally

[6] Consolidated Comments of Hispanic Information and Telecommunications Network ("HITN"), filed February 22, 2005, at 2-5.

specified in the Coalition Proposal. However, because the Coalition recognized that school districts, community colleges and universities may not always be able to timely respond to certain communications, for example, during break periods when offices are closed, it required several follow up attempts by the proponent to reach EBS licensees that do not respond within the 21 day time frame, and provided for an additional 15 days thereafter.[7] CTN and NIA are therefore willing to support the 21 day time frame for responses (rather than 45 days as suggested by HITN), *but only if* the proponent is obliged to follow up and provide additional time consistent with the original Coalition Proposal. Otherwise, as a compromise, the Commission might specify a slightly longer period for response, such as the 45 days sought by HITN. In the overall time frame for transitions, given the importance of effectively engaging EBS licensees in the process, the additional time would not be unduly disruptive.

CTN and NIA agree with HITN that at least one of the penalties proposed by Clearwire to be imposed on a non-responding EBS licensee is outrageously excessive. Clearly, if an EBS licensee does not provide information about its video program services or receive sites, a proponent cannot be held responsible for transitioning the video services to the MBS or installing receive site downconverters. This is consistent with the Coalition Proposal. Clearwire goes further, however, by suggesting that the EBS station involved would lose interference protection – presumably forever becoming a "secondary" station.[8] There is no need or basis for such an extreme penalty, which has no relation to the EBS licensee's failure to respond.

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[7] Coalition Proposal, Appendix B at 15-16.

[8] Clearwire Opposition at 11.

HITN also objects to the "harsh penalties" that could be imposed on EBS licensees that submit counterproposals during the transition process.[9] Specifically, HITN refers to a point made by the WCA that, in the event of a dispute over a counterproposal by an EBS licensee, where it is ultimately determined that the initial Transition Plan was reasonable, the licensee submitting the counterproposal would be required to pay additional documented expenses of the proponent, if any, directly related to implementing the counterproposal over and above costs related to the proponent's reasonable Transition Plan.[10] What HITN fails to recognize is that, in proposing essentially what was in the Coalition Proposal on this matter, the WCA properly also stated that "in fairness, the Coalition also proposed that the proponent reimburse the dispute-related costs of any licensee that objected to the initial Transition Plan if the Transition Plan is found to be unreasonable."[11] Thus, CTN and NIA support the notion of penalties being imposed in the transition, as contemplated by the Coalition Proposal, *as long as both sides are penalized* for unreasonable conduct. This gives both proponents and licensees a financial incentive to act reasonably.

IV. EBS Excess Capacity Lease Issues

There was substantial discussion in the oppositions relating to what the Commission actually did, or should have done, with the rules and policies governing excess capacity leasing for EBS stations under the new secondary markets regime. It has been the consistent position of NIA and CTN, unopposed until now by WCA, that the

[9] HITN Opposition at 4-5.

[10] WCA Petition, filed January 10, 2005 at 29-30.

[11] *Id.* at 30.

existing substantive requirements for EBS leases, developed with substantial input from the educational and commercial communities, should be carried over unchanged into the secondary markets regime as it relates to EBS leasing, except for two particular requirements relating to facility control and modification applications that are fundamentally inconsistent with the *de facto* transfer leasing model.[12] CTN and NIA continue to believe that the Commission need not and should not change EBS leasing requirements. At paragraph 181 of the Report and Order, the Commission clearly stated its agreement with CTN and NIA on this point:

> [W[e agree with NIA/CTN that the substantive use requirements that have historically applied to ITFS must remain in effect in the spectrum leasing context. NIA/CTN describes the "most significant" limitations as: "(i) there must be certain minimum educational uses of ITFS spectrum (typically, a minimum of 20 hours per 6 MHz channel per week); (ii) for analog facilities, there must be a right to recapture an additional amount of capacity for educational purposes (typically, 20 more hours per channel per week); for digital facilities, the licensee must reserve at least 5% of its transmission capacity for educational purposes; (iii) *the lease term may not exceed 15 years*; (iv) the ITFS licensee must retain responsibility for compliance with FCC rules regarding station construction and operation; (v) only the ITFS licensee can file FCC applications for modifications to its station's facilities; and (vi) the ITFS licensee must retain some right to acquire the ITFS transmission equipment, or comparable equipment, upon termination of the lease agreement." As NIA/CTN notes, the purpose behind these limitations was to maintain the traditional educational purposes of ITFS. We believe that the continued application of these substantial use limitations, as well as the retention of ITFS eligibility requirements …will facilitate the traditional educational purposes of ITFS. Accordingly, we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our prior leasing policy and retaining EBS substantive use requirements. [Emphasis added].

In their Petition, CTN and NIA merely asked the Commission to ensure that the text of the new rules accurately reflect the Commission's findings in the Report and

[12] *See* NIA and CTN Joint Reply Comments in WT Docket No. 00-230, filed January 5, 2004 (pointing out that the previous requirements for EBS (then ITFS) licensees to retain responsibility for compliance with rules regarding station construction and operation, and for all station modification applications to be submitted through the EBS licensee, would not be appropriate under the Secondary Markets regime for *de facto* transfer leases). CTN and NIA make this same point in their Petition at 19.

Order.[13] Surprisingly, the WCA and several big players in the commercial community have decided that the Report and Order somehow opens up an opportunity to make an end run on settled EBS lease requirements. They offer absurdly crabbed interpretations of the abundantly clear Paragraph 181 to suggest, in particular, that the Commission actually intended to remove one (but only one) substantive requirement – the 15 year limit on EBS lease terms.[14]

One side or the other here is tone deaf, and the Commission needs to settle the matter. CTN and NIA continue to believe that the existing 15-year lease requirement should remain unchanged. CTN and NIA also believe that the Commission agreed with this view, as reflected in Paragraph 181.

Should the Commission choose to commence a review of EBS lease requirements, however, the scope of that review should be wide open. A review should include not only the possible watering down of existing requirements, such as the 15-year lease term limit, but also proposals from the educational community to add additional substantive requirements that might serve to facilitate the traditional educational purposes of EBS.[15]

V. Self-Transition Proposal Issues

The Illinois Institute of Technology ("IIT") suggests that an EBS licensee should be able to initiate a self-transition of its facilities, prior to a proponent filing to initiate a

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[13] CTN/NIA Petition at 20.

[14] WCA Opposition at 30; Nextel Opposition at 14; Sprint Opposition at 5; Consolidated Opposition to Petitions for Reconsideration of BellSouth Corporation, BellSouth Wireless Cable, Inc. and South Florida Television, Inc., filed February 22, 2005 at 10.

[15] *See* Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., filed January 10, 2005 at 9-11.

transition process, and prior to the transition deadline of January 10, 2008.[16] CTN and NIA respectfully disagree. The self-transition process is intended to help licensees located in markets where no transition initiation plan is filed within the time frame established by the Commission. The concern expressed by CTN and NIA in their Petition was that without permitting self-transitions, such licensees would be subject to involuntary auctioning of their channels. However, prior to the deadline for submitting transition initiation plans, a proponent-driven transition, with its coordinated planning process and other protections, should be the *exclusive* process for market transition. The *ad hoc* process suggested by IIT is ill-defined in scope and provides no such protections for EBS licensees.

VI. J and K Band Issues

One commercial petitioner, Independent MMDS Licensee Coalition ("IMLC"), proposed that certain changes be made in the new J and K bands such that the bands would be licensed only to adjacent channel licensees, and would not be considered "secondary."[17] CTN and NIA agree with the opposition of WCA to IMLC's suggestions. IMLC ignores the fundamental purpose of the J and K bands – to serve as guardband between high and low power bands. The IMLC proposal, without technical or policy justification, would jeopardize the operation of stations operating on channels near the J and K bands, and cannot be adopted.

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[16] Response to Petitions to Reconsideration of Illinois Institute of Technology, filed February 22, 2005 at 9 n.22.

[17] Petition for Reconsideration of the Independent MMDS Licensee Coalition, filed January 10, 2005 at 5-6. CTN and NIA note that the IMLC position was supported by one other entity, Choice Communications, LLC. Opposition and Comments Regarding Petitions for Reconsideration of Choice Communications, LLC, filed February 22, 2005 at 3. Choice does not, however, provide any basis for its views and does not address, much less refute, WCA's opposition to the IMLC proposal.

Respectfully submitted,

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I, Shelia Wright, hereby certify that copies of the foregoing Consolidated Reply of the Catholic Television Network and the National ITFS Association have been served by Hand or by First Class Mail this 9th day of March, 2005, on the following:

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